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HOME DEPOT U.S.A., INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 B&O MANUFACTURING, INC.,
17 Plaintiff,
18 v.
19 HOME DEPOT U.S.A., INC.,
20 Defendant.
21

CASE NO. C07 02864 JSW

**DEFENDANT'S RESPONSES TO
PLAINTIFF'S EVIDENTIARY
OBJECTIONS TO THE DECLARATION
OF DAVID CURLEY**

22 Defendant Home Depot U.S.A., Inc. ("Home Depot") respectfully submits these
23 Responses to Plaintiff B&O Manufacturing, Inc.'s ("B&O") "Evidentiary Objections to the
24 Declaration of David Curley in Support of Defendant's Motion to Transfer Venue to the
25 Northern District of Georgia and to Dismiss Counts Two Through Five of Plaintiff's Second
26 Amended Complaint."

27 Home Depot has presented the Declaration of David Curley to support its Motion to
28

Transfer Venue, and not to support its Motion to Dismiss. On a motion to dismiss, the Court assumes the truth of the allegations in the complaint. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). Given that the Curley Declaration supports Home Depot’s motion to transfer venue, B&O’s evidentiary objections to Mr. Curley’s declaration have no bearing on Home Depot’s arguments for dismissal.

It is well settled, however, that the Court may consider evidence, such as the Curley Declaration, on a motion to transfer venue. *See Jaco Env't'l Inc. v. Appliance Recycling Ctrs of Am., Inc.*, __ F.3d __, 2007 WL 951274, *1 (N.D. Cal. 2007). Moreover, B&O does not object to Mr. Curley's testimony concerning: (1) the location and circumstances under which the parties negotiated the Refund Agreement; *see* Curley Decl. ¶ 6; or (2) the location of the relevant witnesses and documents; *see* Curley Decl. ¶ 8. This is the testimony most relevant to the issues presented by Home Depot's motion to transfer. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000) (outlining factors relevant to § 1404(a) motion to transfer).

Accordingly, even if sustained, B&O's objections have no bearing on Home Depot's Motion to Transfer Venue and or its Motion to Dismiss Counts Two through Five. Home Depot responds further as set forth below.

	<u>OBJECTIONS</u>	<u>RESPONSES</u>
1.	Page 2:12-15 (“Home Depot has been purchasing safety netting from B&O Manufacturing, Inc. (“B&O”) for well over ten years. During the course of the business relationship between Home Depot and B&O, representatives from B&O have visited Home Depot’s Atlanta, Georgia headquarters on numerous	Rule 602 requires that a witness have “personal knowledge,” not “first-hand knowledge,” of the facts to which he testifies. <i>See Los Angeles Times Communs., LLC v. Dep’t of Army</i> , 442 F.Supp.2d 880, 886 (C.D. Cal. 2006) (<i>citing Stuart v. UNUM Life Ins. Co. of Am.</i> , 217 F.3d 1145, 1155 (9th Cir. 2000)). Mr. Curley testified that from September 6,

1	occasions.”)	2005 to May 15, 2007, he was a Senior Manager for
2	Speculation; no foundation; FRE 602	Capital Procurement for Home Depot. Curley Decl.
3	Local Rule 7-5(a) and (b). Mr. Curley	¶ 2. Mr. Curley also testified that he negotiated the
4	testified that he has been a Home	Refund Agreement with B&O on January 31, 2006.
5	Depot employee, commencing	Curley Decl. ¶ 6.
6	September 6, 2005. Accordingly, he	
7	has not established first hand	This testimony establishes his personal
8	knowledge for his testimony that	knowledge and capacity to testify about the history of
9	Home Depot has been purchasing	Home Depot’s relationship with B&O, including the
10	safety netting from B&O for well over	history prior to his becoming Senior Manager. <i>See</i>
11	ten years, nor whether B&O	<i>United States v. Thompson</i> , 559 F.2d 552, 554 (9th
12	representatives have visited Home	Cir. 1977) (manager had sufficient personal
13	Depot’s Atlanta headquarters over this	knowledge under Rule 602 to testify as to company
14	long term relationship, of which he	procedures in operation even prior to his becoming
15	has been involved for less than 1/5	manager). At most, B&O’s objection goes to the
16	thereof.	weight the Court should give to this testimony, but
17		not to its admissibility.
18		
19		
20		B&O does not explain how the form of Mr.
21		Curley’s Declaration violates Local Rule 7-5(b).
22	2. Page 2:20-22 (“ Shortly after	Home Depot incorporates by reference its
23	executing the MOU, Home Depot	Response to the First Objection, above. Home Depot
24	pre-paid B&O over \$5 million for	further responds as follows:
25	the split curtain safety netting	Mr. Curley’s testimony that he negotiated the
26	systems that Home Depot	Refund Agreement with B&O’s president establishes
27	committed to purchase under the	the foundation for this testimony. <i>See</i> Curley Decl. ¶
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1	MOU”)	6. Mr. Curley could not negotiate a Refund
2	Speculation; no foundation; FRE 602;	Agreement related to the parties’ performance under
3	FRE 1002; Local Rule 7-5(a) and (b),	the MOU without having (or at least gaining)
4	vague as to time. Further, as Mr.	personal knowledge of Home Depot’s payment
5	Curley apparently started with Home	history.
6	Depot on September 6, 2005, and as	Contrary to B&O’s objections, Federal Rule of
7	he states that Home Depot prepaid	Evidence 1002, which concerns the authentication of
8	B&O over \$5 million for split curtain	documents, is inapposite. It is unclear why the exact
9	safety netting systems under the MOU	time at which Home Depot pre-paid B&O is relevant
10	(which B&O disputes), shortly	in any way. Likewise, it is unclear how this
11	thereafter, this statement also appears	testimony could be hearsay, as it does not convey a
12	to constitute hearsay (FRE 802). Mr.	statement by any person other than Mr. Curley.
13	Curley has not demonstrated that he	
14	has sufficient knowledge of the	
15	payment history of Home Depot to	
16	B&O. Indeed, he admits in his	
17	Declaration, at page 4:1-2, that	
18	persons other than himself are persons	
19	with such purported knowledge. With	
20	respect to FRE 1002, the writings	
21	reflecting payments are required in	
22	order to prove Mr. Curley’s assertion.	
23	3. Page 2:22-23, (“ Of the over \$5	Home Depot incorporates by reference its
24	million, however, B&O was unable	Responses to the First and Second Objections, above.
25	to deliver roughly \$2 million of	Home Depot responds further as follows:
26	products for which Home Depot	Mr. Curley’s testimony that he negotiated the
27	prepaid.”)	Refund Agreement with B&O’s president establishes
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1	Speculation; no foundation; FRE 602;	the foundation for this testimony. <i>See</i> Curley Decl. ¶
2	FRE 1002; Local Rule 7-5(a) and (b).	6. Indeed, the sole purpose of negotiating the Refund
3		Agreement was to devise a payment plan under
4		which B&O would refund Home Depot the amount it
5		paid for products B&O never delivered. <i>Id.</i>
6	4. Page 3:11-13 (“ Home Depot’s Legal	Home Depot incorporates by reference its
7	Department reviewed and approved	Responses to the First, Second and Third Objections,
8	the Refund Agreement. All of	above. Home Depot responds further as follows:
9	Home Depot’s Legal Department	Mr. Curley testified that he was a Senior
10	employees who can testify regarding	Manager at Home Depot from September 6, 2005 to
11	the approval of the Refund	May 15, 2007. Curley Decl. ¶ 2. Mr. Curley also
12	Agreement are residents of Georgia	testified that he negotiated the Refund Agreement on
13	and are based at Home Depot’s	Home Depot’s behalf, which was eventually
14	Atlanta, Georgia headquarters.”)	approved by Home Depot’s Legal Department.
15	Speculation; no foundation; FRE 602;	Curley Decl. ¶¶ 6-7. This testimony establishes his
16	Local Rule 7-5 (a) and (b); hearsay.	personal knowledge of the location of Home Depot’s
17	Mr. Curley has not demonstrated how	Legal Department employees.
18	he knows which employees are able to	
19	so testify, nor how he has knowledge	
20	of their residence.	

1 DATED: October 12, 2007.

BONDURANT, MIXSON & ELMORE, LLP

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3 By: /s/ Christopher T. Giovinazzo
4 Christopher T. Giovinazzo
5 Ronan P. Doherty
6 Attorneys for Defendant
7 HOME DEPOT U.S.A., INC.
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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2007 I have electronically filed the within and foregoing **RESPONSES TO PLAINTIFF'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF DAVID CURLEY** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record, and by U.S. mail, postage prepaid thereon, addressed as follows:

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/s/Christopher T. Giovinazzo
Christopher T. Giovinazzo